BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT L. BRUNS, Claimant, v. YOUNG LIVING RESEARCH FARMS, LLC, Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	)	**IC 05-005682** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed December 18, 2007

INTRODUCTION

Pursuant to Idaho Code § 72-506, Commission Chairman James F. Kile conducted a hearing in Coeur d'Alene, Idaho, on July 17, 2007. Michael J. Verbillis of Coeur d'Alene represented Claimant. Edgar L. Annan of Spokane, Washington represented Defendants. The parties submitted oral and documentary evidence. No post-hearing depositions were taken. The parties submitted post-hearing briefs. The matter came under advisement on October 16, 2007 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are as follows:

1. Whether Claimant sustained an injury from an accident arising out of and in the course of employment; and

2. Whether intoxication was a reasonable and substantial cause of the injury pursuant to Idaho Code § 72-208.

CONTENTIONS OF THE PARTIES

On Friday, May 13, 2005 Claimant was severely injured in a single car accident. Although accidents and injuries incurred while going to or coming from work are generally not compensable, Claimant contends the totality of the circumstances render his case an exception. In particular, those circumstances are that Claimant was 1) operating a company vehicle; 2) returning from a dual purpose errand; and 3) residing on Employer's premises, which was; 4) located on a remote work site. Claimant maintains that even if the facts indicate he deviated from the work purpose errand by socializing, he returned to the work purpose when driving back to Employer's premises. Finally, regarding whether Claimant was intoxicated at the time of the accident, Claimant argues the circumstantial evidence is legally insufficient.

The Defendants contend the facts of the case fall clearly within the "going and coming" rule. Should a dual purpose be found, the Defense maintains Claimant substantially deviated from the work purpose to a purely personal one. Defendants assert the circumstantial evidence proves intoxication was a reasonable and substantial cause of the injury pursuant to Idaho Code § 72-208. Although this statute merely diminishes liability, Defendants also ask the Commission to consider the circumstances of intoxication in deciding whether the accident arose out of and in the course of employment.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Hearing testimony of Claimant, Daniel Wayne McBride, Luis Alberto Montejo, Neil Dale Linsenmann, and Marcella Ann King; and

2. Defendants' Exhibits 1, 2, 3 (excluding Bates No. 000036), 4, and 10 through 15.

After considering the above evidence and the briefs of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. At the time of hearing Claimant was 48 years old and held a high school diploma.

2. Youngs Living Research Farms (the Farm) was located about 15 miles south of Saint Maries, Idaho, in a forested and mountainous area. Twenty to twenty-five acres of lavender and melissa crops were cultivated and distilled down to essential oils for distribution world wide. Owners Gary Young and Doug Nelson supervised the Farm remotely from another farm in Utah.

3. **Duties.** On August 11, 2004 Employer hired Claimant as one of three co-managers. His job involved construction, maintenance, distilling, and greenhouse operations. One of Claimant's duties was to keep the greenhouse temperature from falling below 50 degrees. *Tr. p. 66, ln. 24 – p. 67, ln. 5.*

4. Co-manager Neil Linsenmann supervised 10-12 field laborers, field foreman Luis Albert Montejo, and mechanic Daniel Wayne McBride. Co-manager Marcella Ann King managed the office.

5. **Salary and Residence.** Claimant received a salary of $1,458.34 every two weeks. *Ex. 13, Bates No. 000102.* He elected to live on the Farm, as did other members of the farming team. In the warmer months, Claimant stayed in a tent. In the colder months, he stayed in the conference room located above the Farm office. Linsenmann also lived on the Farm in his camper Monday through Friday, driving it home on the weekends.

6. **Work Schedule.** Based on the statements of Claimant, Linsenmann, King, and Montejo, the Commission finds Claimant generally worked 5 days per week with some Saturday work

managing the field crew and tending to the greenhouses. He testified the farm was a six day per week operation and someone was to be around on weekends to keep an eye on the farm. Linsenmann testified Claimant, like Linsenmann, had flexibility to leave Saturday afternoons and return early Monday mornings. He also testified there was no known rotation policy for weekend coverage between the co-managers, except during harvest in July and August. King testified that during the off-season they generally worked 8 hour days with some weekend work to keep the greenhouses warm. This duty could be rotated with any of the farm employees.

7. **Company Vehicle.** Claimant owned two vehicles. Claimant also testified he had authorization from Gary Young to use Employer's ¾ ton 1997 Dodge Crew Cab pickup truck. *Tr. p. 58, ln. 24-25.* Although Employer's policy manual restricted the personal use of a company vehicle, Claimant regularly used the truck for various reasons. He ran errands to get mechanical and construction parts. He regularly drove the field hands to Saint Maries where they would shop for groceries, run laundry, and visit the bank. Linsenmann testified he thought Claimant was permitted to use the company truck for personal business. *Tr. p. 168, ln. 11-13*. King testified to the contrary. *Tr. p. 186, ln. 4-6.* Employer paid for the fuel Claimant used to drive the truck. Employer also paid Linsenmann's and King's work-related fuel expenses.

8. **Drug and Alcohol Policy.** On March 15, 2005 Claimant signed Employer's zero-tolerance drug and alcohol policy.

9. **Herbicide Measuring Device.** During the week of May 2, 2005 Employer held a corporate-organized training on herbicide use. Once diluted with water, the herbicide solution was to be applied manually with a sprayer. It was to be mixed on a ratio of one to two ounces of herbicide per five to ten gallons of water. Montejo testified if the 5 gallon back pack sprayer was used, a one-ounce shot glass measuring device would be easier to use than measuring cups.

However, he did not use or see a back pack sprayer. He recalled Claimant said he would get a pack. *Tr. p. 150, ln. 19 – p. 151, ln. 20.*

10. **Accident**. Friday, May 13, 2005 was pay day at the Farm. In the early afternoon Claimant drove several field hands to Saint Maries in the company truck where they went to the bank and grocery store. *Tr. p. 87, ln. 11-21*. After returning to the Farm in mid-afternoon, Claimant received a phone call at the office. His car insurance agent requested he immediately come to Saint Maries and pay his premium to avoid a lapse in coverage. After delivering some firewood to Montejo at the field crew facilities, Claimant left for Saint Maries in the company truck. The exact time of his departure is unclear.

11. In Saint Maries, Claimant first paid the premium, then stopped at a liquor store. He purchased two bottles of wine and a shot glass marked in milliliters. Claimant then telephoned a friend named Sally and spent the rest of the evening in Saint Maries with her. Claimant gave her one of the two bottles of wine he had purchased. They briefly went to an establishment for a beer. Then they went to Sally's place for about an hour. Next, they returned to a local bar where Claimant drank one or two beers and danced. He walked Sally home at around 10 pm and then got in the truck to return to the Farm. At hearing, Claimant denied being intoxicated when he left Saint Maries. *Tr. p. 77, ln. 1-12*.

12. Claimant testified it was dusk when he left Saint Maries for the roughly 15 mile drive back to the Farm. Claimant missed the turn off from Benewah Road to Coon Creek Road. He testified he recalls pulling to the left of the road, then back to the right in order to turn the truck around. *Tr. p. 127, ln. 25 – p. 128, ln. 1-2.* He testified he thought "of the greenhouses and making sure that the fires haven't gone out and getting back to work and getting that done before. . . settle[ing] in for the evening, and then the next thing I remember was waking up under

the truck." *Tr. p. 67, ln. 19-23.* The truck had rolled over a steep embankment. Some time that evening, Claimant regained consciousness, finding himself pinned at the legs beneath the wreckage.

13. Claimant bravely endured the next two and one-half days unnoticed. He survived by resorting to survival techniques gained from years of mountaineering. A potato chip bag he placed out at night collected the dew he drank in the morning. And grass seeds within reach provided some nourishment.

14. Claimant remained this way until Monday morning, May 16, 2005, when some loggers found Claimant and radioed for help. Following two hours of working with the 11-member fire crew, Claimant finally escaped the accident scene. He was taken to Saint Maries for an initial medical evaluation, then flown to the Kootenai County Hospital in Coeur d' Alene. The hospital records note Claimant reported having "a couple" or "a few" alcoholic beverages the night of the accident. *Ex 10, Bates Nos. 000081, 000083, and 000086.*

15. **Injuries.** On May 27, 2005, Claimant was discharged from the hospital with the following diagnosis: bilateral crush injuries to the lower extremities; suspected complete arterial thrombosis, occlusion and cadaveric extremity of the right lower extremity; neurologic injury to the left leg with arterial flow intact; rhabdomyolysis; brachial plexus injury to the right upper extremity. *Ex 10, Bates No. 000086.* At the time of the hearing, his right leg had been amputated above the knee due to these injuries.

16. **Sheriff Report.** According to the Idaho Vehicle Collision Report generated by Officer Bryan Dickenson of the Benewah County Sheriff Department, Claimant "rounded corner, drove left of center, drove off roadway, rolled the vehicle several times, was partially thrown from

vehicle. Driver was trapped under the vehicle when it came to rest on its top when it impacted the trees at the bottom of the embankment. " *Ex 13, Bates No. 000095*.

17. The report further states the accident occurred in an undeveloped locality, with dark lighting conditions, rain, and muddy, rutty, bumpy, pothole-ridden, gravel roads. There were no visual obstructions. The vehicle was severely deformed and towed away by Benewah Motors after the accident. The involvement of alcohol or drugs was not detected or tested. *Ex. 12, Bates No. 000094.*

18. A bottle of wine was found inside the truck after the accident. Claimant testified he was going to give it to his parents' friend the next time he drove to Nebraska. King testified she saw the above-referenced shot glass in the truck after the accident. However, it is noticeably absent from the record.

19. **Termination.** Employer sent Claimant a separation notice on May 31, 2005 while he was recovering in the hospital. According to the separation notice, Claimant was terminated for unacceptable conduct. Remarks on the notice were "violation of company policies-improper use of company vehicle after work day, unauthorized personal long distance phone calls and destruction of property." The following performance summary categories were marked "unsatisfactory:" quality, productivity, adherence to policy, interpersonal relationships, and judgment. *Ex. 13, Bates No. 000107.*

20. **Shot Glass.** Claimant testified he bought the shot glass "[s]o the workers on Monday morning, when they started work applying the herbicide with the new techniques they had just learned, could properly mix it." *Tr, p. 64. ln. 19-22*. Montejo testified that on the Monday following Claimant's accident the workers performed greenhouse work as previously planned. *Tr. p. 157, ln. 10-22.* King and McBride testified larger measuring cups with ounce increments

were already available at the Farm. *Tr. p. 146 ,ln. 1-14.* However, Claimant testified he thought ". . . there was a problem with the accuracy of what was available. . . ." *Tr. p. 100, ln. 18-20.*

DISCUSSION

Compensability - Going and Coming Rule

21. To be compensable under the workers' compensation law, an injury must be caused by an accident "arising out of and in the course of" employment. Idaho Code § 72-102(18)(a); Idaho Code § 72-201. It is the Claimant's burden to show by a preponderance of the evidence that the accident arose out of and in the course of employment. Cheung v. Wasach Elec., 136 Idaho 895, 897, 42 P.3d 688, 690 (2002).

22. Unless an exception applies, under ordinary circumstances a worker is not in the course and scope of employment while going to and coming from an employer's place of business for purposes of workmen's compensation law. Barker v. Fischbach & Moore, Inc., 105 Idaho 108, 109, 666 P.2d 635, 636 (1983); *citing* Clark v. Daniel Morine Construction Co., 98 Idaho 114, 559 P.2d 293 (1977); *citing* Spanbauer v. Peter Kiewit Sons' Co., 93 Idaho 509, 465 P.2d 633 (1970). The reason the employee is generally not awarded compensation for injuries that occur while traveling to and from work is that the employment relationship is considered to be suspended from the time the employee leaves his work to go home until he resumes his work the next day. Barker, *supra.*

23. Exceptions to the going and coming rule are numerous and will be discussed hereafter.

24. Claimant offers a totality of the circumstances argument, declining to classify the facts into any specific exception previously announced by the Idaho Supreme Court. The case does warrant a more comprehensive analytical approach. Some of the facts, on their face, appear to fall within an exception to the going and coming rule. And Claimant does present as a generally

honest and sympathetic person. However, a categorical and detailed analysis of the facts do not support Claimant's claim for benefits.

25. **Employer's Premises, Transportation, and Immaterial Facts.** "Among the exceptions to the general rule will be found incidents where the employee is on the employer's premises in the vicinity of the actual situs of the employment. . . where going or returning in some transportation facility furnished by the employer. . . ." Pitkin v. Western Construction, 112 Idaho 506, 507, 733 P.2d 727 (1987); *citing* Erikson v. Nez Perce County, 72 Idaho 1, 235 P.2d 736 (1951).

26. Claimant's May 13, 2005 accident occurred off Employer's premises, during non-work hours. It is undisputed Claimant was driving employer's truck. The Commission finds Claimant had permission to drive the truck off duty. Claimant's testimony was credible on this matter. Gary Young, Claimant's supervisor, did not persuasively testify to the contrary. However, whether Claimant had Employer's permission to drive the truck while off duty is immaterial to our task of determining whether the accident was work related.

27. The fact that Claimant lived on the premises is similarly immaterial. It simply brings into question whether Claimant can fairly be said to have been driving home or driving back to work when the accident occurred.

28. Also not determinative is the question of whether Claimant was intoxicated on the night of the accident. If a work purpose is found, intoxication merely affects the amount of benefits received. As far as this relates to Claimant's credibility, the Commission finds claimant testified truthfully that he was not intoxicated at the time of the accident. He had a few beers and reported this to the medical providers when they initially treated him. As reported by Officer Dickenson, alcohol and drugs were not detected or tested. Besides an implication, Defendants

did not present any evidence whatsoever indicating Claimant was intoxicated at the time of the accident.

29. **Traveling Employee, Dual Purpose and Substantial Deviation.** "When an employee's work requires him to travel away from the employer's place of business or his normal place of work, the employee is covered by worker's compensation." Cheung v. Wasatch, 136 Idaho 895, 897, 42 P.3d 688, 690 (2002); *citing* Ridgway v. Combined Ins. Companies of America, 98 Idaho 410, 411, 565 P.2d 1367, 1368 (1977). Also applicable to a traveling employee is the dual purpose rule whereby travel

> . . . may constitute a business trip, although done in part to serve the personal purposes of the employee. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk." Reinstein v. McGregor Land & Livestock, 126 Idaho 156, 159, 879 P. 2d 1089 (1994); *citing* Morgan v. Columbia Helicopters, 118 Idaho 347, 349, 796 P.2d 1020, 1022 (1990) (citations omitted). *See also:* Mondragon v. A & L Reforestation, Inc., 130 Idaho 305, 309, 939 P.2d 1384, 1388 (1997).

30. The Commission finds no legitimate work purpose existed when Claimant left Employer's premises to go to Saint Maries on May 13, 2005. While the hearing officer in this case found Claimant's demeanor to be direct, essentially honest, and generally believable, there are inconsistencies between his testimony of a work purpose and other portions of the record which render this crucial portion of his testimony unpersuasive. Montejo credibly testified there was no immediate need for such a device since spraying was not done on Monday after the accident. King and McBride credibly testified that measuring devices were already available at the Farm. Montejo had never seen a back pack sprayer for which smaller herbicide measurements would be required. Claimant's contention that there was "a problem with the

accuracy of what was available" does not ring true. Such chemical measurements appear most likely to have occurred on a larger scale in which cups, rather than ounces, would be most suitable. Finally, the absence of a shot glass in evidence and its documented purchase in the record, calls into question its real significance in this case. For these reasons, the Commission finds that if Claimant did purchase the shot glass it was not for work purposes.

31. The impetus behind Claimant's decision to go back to Saint Maries on May 13, 2005 was to pay his personal car insurance and to socialize. If the insurance payment and the potential for socializing had not existed, Claimant most likely would not have gone to Saint Maries alone for the second time on May 13, 2005 to get the shot glass. Instead, Claimant was driving home from a night on the town; Claimant was not driving back to work after running a business errand.

32. Even assuming a work purpose existed, the Commission further finds Claimant substantially deviated from this purpose. Rather than returning directly from the liquor store, Claimant socialized for several hours. These activities severed any business purpose that may have existed in Claimant's trip to Saint Maries and back to the Farm.

33. **Peculiar Risk.** The final applicable exception to the going and coming rule is where such travel to and from work "involves special exposure to a hazard or risk peculiarly associated with the employment and that risk is causally connected to the accident. Clark v. Daniel Morine Construction Co., 98 Idaho 114, 115, 559 P.2d 293, 294 (1977); *citing* Jaynes v. Potlatch Forest, Inc., 75 Idaho 297, 271 P.2d 1016 (1954); Diffendaffer v. Clifton, 91 Idaho 751, 430 p.2d 497 (1967); In Re South, 91 Idaho 786, 430 P.2d 677 (1967); Spanbauer v. Peter Kiewit Sons' Co., 93 Idaho 509, 465 P.2d 633 (1970). *See also:* Ridgway v. Combined Ins. Companies of America, 98 Idaho 410, 411, 565 P.2d 1367, 1368 (1977).

34. The Commission finds Benewah and Coon Creek roads are not a peculiar risk for purposes of the going and coming rule. Claimant had driven the roads many times without incident. The photos of the road reveal two roomy lanes of gravel road. Roads of this sort are common in Idaho, and do not pose a peculiar risk. *See:* O'Clark v. Daniel Morine Construction Co., 98 Idaho 114, 559 P.2d 293 (1977). The fact that Claimant was trapped under the vehicle for nearly three days does not change the character of these roads and persuade this Commission otherwise.

Compensability - Remote Work Site Doctrine

35. The remote work site doctrine compensates workers living at remote work sites who are injured while engaging in recreational activities. "The policy rationale behind the remote work site doctrine is that when job conditions limit the non-employment activities of workers at a remote work site, the employer's reasonable expectations include those few recreational activities available." Mondragon v. A&L Reforestation, Inc, 130 Idaho 305, 309, 939 P.2d 1384, 1388 (1997). The Idaho Supreme Court has not adopted the remote work site doctrine, and the Court's restricted analysis of this issue in Mondragon is dicta. *Id.* at 310. Therefore, the Commission declines to apply this doctrine as an exception to the going and coming rule in the present case.

36. None of the going and coming rule exceptions apply. Neither does the remote work site doctrine. Therefore, the Commission finds Claimant has failed to prove, by a preponderance of the evidence, that his accident and injuries arise out of and in the course of employment.

Intoxication

37. Idaho Code § 72-208(2) and (3) state in pertinent part:

> If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's

> intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated. . . . (3) "Intoxication" as used in this section means being under the influence of alcohol or of controlled substances, as defined in section 37-2701(d)[37-2701(e)], Idaho Code. . . .

38. The Commission finds this issue moot based on the above conclusion that Claimant's accident and injury did not arise out of and in the course of employment. Furthermore, Claimant credibly testified he was not intoxicated at the time of the accident. No witnesses testified to the contrary. No evidence of blood alcohol levels has been presented. Defendants have failed to prove intoxication was a reasonable and substantial cause of the injury pursuant to Idaho Code § 72-208.

CONCLUSIONS OF LAW

1. Claimant failed to prove he sustained an injury from an accident arising out of and in the course of employment;

2. The remaining issue is, therefore, rendered moot.

ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Claimant did not sustain an injury from an accident arising out of and in the course of employment.

2. The remaining issue is, therefore, rendered moot.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

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DATED this __18th___ day of December, 2007.

INDUSTRIAL COMMISSION

__/s/_____
James F. Kile, Chairman

__/s/_____
R.D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _18th__ day of ___Dec.____, 2007 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** was served by regular United States Mail upon:

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